

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE
LODGE 5****-AND****AWARD AND
OPINION****CITY OF PHILADELPHIA**

Docket No. 14-20-1900-1573 (Consolidated)

Grievant: P/O Jerry R. Moore PR# [REDACTED] Thirty (30) day suspension and
Transfer (Consolidated)

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BEFORE: ERNEST WEISS, ARBITRATOR

APPEARANCES:	For the Union:	Stephen J. Holroyd, Esq. Jennings Sigmond, P.C.
	For the City:	Monica Marchetti-Broc, Esq. City of Philadelphia

Issue: Did the City of Philadelphia meet its burden of proof
to justify the discipline of Grievant, and if not, what shall
be the remedy?

PRELIMINARY STATEMENT

Having been selected in accordance with the provisions of the collective bargaining agreement ("CBA") between the parties hereto, on May 28, 2015 I conducted an arbitration hearing at the offices of the American Arbitration Association, 230 Broad Street, 12th Floor, Philadelphia, PA, at which time the parties were offered a full opportunity to present evidence and argument in support of their respective positions. At that time, both the Union and the City submitted exhibits that were admitted, along with joint exhibits.

THE CITY'S OPENING STATEMENT

The City of Philadelphia ("City") and the Fraternal Order of Police, Lodge 5 ("Union") are parties to a Collective Bargaining Agreement ("CBA"). On Tuesday, December 30, 2008, Police Officer Moore ("Grievant") is alleged to have committed a retail theft of a multifunctional tool from the Columbus Blvd. Home Depot in Philadelphia. P.O. Moore was confronted by the Store's Loss Prevention Officer, S [REDACTED] M [REDACTED] ("M [REDACTED]") and requested that P.O. Moore return with him to an office at the rear of the store where he was interrogated by Detective N [REDACTED] A [REDACTED]. M [REDACTED] observed Moore remove the packaging material from the tool and put it in the pocket of the hoodie he was wearing. Other police officers arrived, and the Grievant was handcuffed and transported to the South Detective Division. On the ride, P.O. Moore admitted that he had taken the merchandise, but that it had already been returned to the Home Depot. The retail value of the tool was \$49.97.

A [REDACTED] B [REDACTED] ("B [REDACTED]"), a cashier at the Home Depot, stated that he saw P.O. Moore as he was leaving the store, and further observed M [REDACTED] take him to the rear of the store. P.O. Moore admitted that he was carrying a weapon and had taken the merchandise in question. Following the disclosure of the gun, 911 was called and P.O. B [REDACTED] arrived and called for further assistance.

An investigation was conducted by the Internal Affairs Division ("IAD") and it was determined that P.O. Moore violated Police Department policies and disciplinary code. Grievant was given a 30-day suspension without pay and transferred out of the unit. The discipline was imposed within the Matrix in the Disciplinary Code in use at that time.

The City seeks a ruling that the disciplinary action was imposed for just cause.

THE UNION'S OPENING STATEMENT

The Union opened by indicating that the imposition of a 30-day suspension was inappropriate and unjust because most of the charges filed would not be proven. P.O. Moore had seventeen years on the force at the time of the incident. On the day in question, he had, in fact, purchased two doors for about \$200 and needed the stud-finding scanner at issue to install the doors that were purchased. The packaging had been opened and was not resealed and was returned to Home Depot. The Grievant never denied that he took the merchandise. Moreover, at the criminal trial, P.O. Moore was acquitted.

It is the Union's position that there was no basis for any discipline, especially the Police Commissioner's severe Direct Action, and P.O. Moore

seeks a “make whole” remedy. The remedy sought includes back pay, reversal of the original determination, that the record of the disciplinary action be expunged from his personnel file and that the transfer be reversed and that he be reinstated to his original district.

THE CITY’S TESTIMONY

P.O. P [REDACTED] B [REDACTED] was the City’s first witness. He stated that he was on the 4th District’s payroll and was working an 8 p.m. – 4 a.m. shift on the date in question. Home Depot is located in his district. He testified that the Grievant was armed with a gun, and that the store security guard took the Grievant to its Loss Prevention Office. He testified that when P.O. Moore was asked for his gun, he apparently gave it to the Home Depot security officer along with his credentials. B [REDACTED] testified that the Grievant was in civilian clothes at the time. His supervisor, Sgt. G [REDACTED] arrived at the scene. He stated that P.O. Moore admitted that he had concealed the tool without paying for it. P.O. B [REDACTED] testified that he gave the Grievant’s weapon to Sgt. G [REDACTED] and the matter was referred to IAD.

He stated that the Grievant was cooperative, and when he arrived at IAD he stated that he never intended to take the tool without paying for it.

P.O. G [REDACTED] P [REDACTED] then testified. He stated that he had thirteen years on the police force and worked in the 4th District. He testified that he was on regular patrol and was called to the Home Depot Loss Prevention office on the day of the incident. He stated that an off-duty police officer was in the room when he arrived, and that a sergeant arrived and ordered P.O. P [REDACTED] to arrest the Grievant and put him in handcuffs and place him in the back of the car, which he called for.

Exhibit C-2 is the statement P.O. P [REDACTED] made to IAD Lt. Roland Lee on December 30, 2008, in which P.O. P [REDACTED] states that Moore indicated that he made an "honest mistake," in that he stuck the tool in his pocket after one of the doors he was purchasing slipped and shattered the tool's packaging. Finally, he testified that, as he stated in C-2, he overheard the Home Depot security officer say that he "saw (Grievant) and he put it in his pocket."

The City's next witness, the Police Commissioner, who was reminded that he was still under oath, testified that he was familiar with C-1 (the record of the Case, Internal #08-1161). He testified that the Grievant received a 30-day suspension without pay by a Commissioner's Direct Action. Joint Exhibit J-4 is the Statement of Charges Filed and Action Taken, which indicates that the Grievant repeatedly violated Police Department Rules and Regulations, and that he had "little or no regard for Grievant's responsibility as a member of the Philadelphia Police Department," and is witnessed by Lt. Robert Morris of the IAD. A notice of receipt of the charges is signed by the Grievant on April 21, 2009. Attached is an employee assessment by his Captain, which indicates that P.O. Moore had handled his assignments professionally with little or no supervision and had performed well. The assessment document also indicates two disciplinary actions on January 15, 1995 and August 9, 2000.

P.O. Moore was transferred to the 14th District, where according to the witness, an operational need was present, and the transfer was allowed under the CBA. Finally, it was noted that P.O. Moore was acquitted at trial.

The City's next witness, Captain David Harte, Commander of the IAD, stated that he recognized C-1, and testified that it was his signature on

page 12 of the document and confirmed that he had supervised the investigation in question. C-1 also includes two photos of the stud-finder, the item stolen, as well as receipt for the doors. The tool was taken into custody as evidence and the Grievant was found by the Police Department to have been guilty of retail theft.

THE POSITION OF THE FOP

The Grievant, P.O. Jerry Moore, was the Union's sole witness. In response to the Union's attorney, Stephen J. Holroyd, P.O. Moore stated that he now had 22 years of service with the Police Department and was working a 12 a.m. to 8 a.m. shift. He testified that he was helping his uncle in construction. Between 6 and 7 p.m. on the date in question, he went to the Home Depot for nails and doors. He testified that when he got to the store, he took a cart that would hold the doors he wanted to purchase. One of the doors tore the packaging of the stud-finder scanner. He put the tool in his pocket in order to push the cart with the doors. The tool fell while he loaded the cart with the doors. He then approached the cash register and paid. He further testified that he was confronted while he was leaving the store, and the scanner was sticking out of his pocket. He testified that he was charged criminally, but was found not guilty.

He testified further that he was dressed in a hoodie with a section of pockets in the middle of the sweatshirt. The tool had fallen to the bottom of the cart, under one of the doors. Further, he testified that the store had a barcode for its items. He testified that he picked up the stud-finder and put it into the hoodie pocket and it was hanging out on the right hand side. He stated that he did not feel it there. He further stated that he had a dominant right hand and would have felt it. He claimed that it did not make sense to

leave the tool protruding from his pocket if he had intended to steal it. He testified that he paid for the doors, but not for the tool.

On cross-examination, he testified that he was not fired, but that the Police Commissioner decided to impose a 30-day suspension without pay and to transfer him out of the unit. At this point, the Union rested and the City rested.

THE CITY CLOSING

The City's attorney stated that based on the unrefuted testimony of the City's witnesses, it made common sense to find that the City had met its burden. The stud-finder packaging had been concealed in the pocket of the hoodie. All other items were in the cart. The disciplinary action should be sustained.

THE FOP CLOSING

Attorney Holroyd stated that it was not surprising but there are no facts that he actually stole the item, and therefore the City failed to meet its burden of proof that P.O. Moore committed retail theft, constituting conduct unbecoming an officer. The City did not have proof, and therefore had not met its burden. He argued that, at the end of the day, it is apparent that P.O. Moore simply unintentionally forgot to pay for the stud-finder. If he had wanted to take it, he would not have left the tool sticking out of his pocket; it was simply an honest mistake. The doors had torn off the packaging.

Ultimately, he did, in fact, pay for it. He stated that the Grievant had no previous disciplinary record of retail theft.

He stated that the City got the punishment for retail theft wrong. He argued that discipline imposed on P.O. Moore was not for just cause, and he closed by requesting that the arbitrator make P.O. Moore whole for all his losses.

DISCUSSION AND OPINION

The case is the appeal of a finding and subsequent disciplinary action of a 30-day suspension without pay and a transfer out of P.O. Moore's unit, sought by the FOP on behalf of the Grievant and any other police officers similarly situated.

Both parties agree that prior to the arbitration, full due process was observed in this case. Although the Grievant was found to have violated the Disciplinary Code in the proceedings herein, I find that the IAD report is evidence of due process, but not evidence of the truth of the findings therein. I also note that although the IAD report indicates that there had been two prior disciplinary actions, those appear to have been minor, and in any event occurred many years prior to the incident in question, so I do not deem them relevant for purposes of this case.

I am reviewing the case based on the credibility of the witnesses before me, together with the exhibits and documents presented.

The City's witnesses, Police Officers B [REDACTED] and P [REDACTED] Capt. Harte and the Police Commissioner, each have service with the Philadelphia Police Department, had no apparent reason to lie, and gave consistent and credible

evidence. It was pointed out that the transfer of the Grievant represented an apparent operational need for the District and was authorized by the CBA.

On the other hand, I find that P.O. Moore was somewhat evasive as a witness, and consequently less credible than the other witnesses. I am not persuaded by the Grievant's testimony, notwithstanding the fact that he was found not guilty at the criminal trial, where the burden of proof is higher than in an administrative proceeding.

Therefore, having thoroughly considered all the evidence, including the arguments and allegations of both parties, I have determined for the above stated reasons that the Grievant, P.O. Jerry Moore, was disciplined for just cause. Therefore, his grievance must be denied.

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The undersigned arbitrator, having been designated in accordance with the Collective Bargaining Agreement entered into by the above parties, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

The grievance herein is hereby denied.


ERNEST WEISS, ARBITRATOR

STATE OF NEW JERSEY)

) ss:

COUNTY OF SOMERSET)

On this 25th day of June, 2015, before me personally came and appeared Ernest Weiss, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed the same.

JULIE FARKAS
NOTARY PUBLIC, NEW JERSEY
My Commission Expires May 3, 2015